

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Falcon First, Inc. d/b/a Charter Communications)	
)	CSR-5963-E
Petition for Determination of Effective)	
Competition in Eleven New York Communities)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 2002

Released: November 1, 2002

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Falcon First, Inc. d/b/a Charter Communications ("Charter") has filed with the Commission a petition pursuant to Section 76.7 of the Commission's rules for a determination of effective competition in eleven communities in New York (the "Communities").¹ Charter alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(a) of the Communications Act of 1934, as amended ("Communications Act"), and Section 76.905(b)(1)-(2) of the Commission's rules, and seeks revocation of the certification of the local franchising authorities in the Communities to regulate basic cable service rates.² Charter claims the presence of effective competition in seven of the Communities stems from the competing services provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. and EchoStar Communications Corporation ("EchoStar").³ Within the remaining four Communities, Charter contends that effective competition exists under the low penetration test.⁴ No opposition to the petition was filed.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be

¹ 47 C.F.R. § 76.7.

² 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(2).

³ The seven Communities alleged to be subject to competing provider effective competition are the City of Plattsburgh; the Towns of Beekmantown, Peru, Plattsburgh, and Schuyler Falls; and the Villages of Dannemora and Keeseville.

⁴ The four Communities alleged to be subject to low penetration effective competition are the Towns of Au Sable, Chesterfield, Dannemora, and Saranac.

subject to effective competition,⁵ as that term is defined by Section 76.905 of the Commission's rules.⁶ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. Based on the record in this proceeding, Charter has met this burden.

A. The Competing Provider Test

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds fifteen percent (15%) of the households in the franchise area.⁷

4. Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁸ Charter has provided evidence of the advertising of DBS service in news media serving the Communities.⁹ We find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer more than 12 channels of video programming, including more than one non-broadcast channel.¹⁰ Charter has demonstrated that the Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise areas. Charter has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of the DBS providers, and that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DirecTV and EchoStar.¹¹ Therefore, the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Charter sought to determine the competing provider penetration in seven of its franchise areas by purchasing a report from SkyTrends that identified the number of subscribers attributable to the DBS providers within the Communities on a five-digit zip code basis.¹² However, rather than simply accepting SkyTrends' figures, Charter assumes that some of the DBS subscribers identified in the report may

⁵ 47 C.F.R. § 76.906.

⁶ 47 C.F.R. § 76.905.

⁷ 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁸ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁹ Petition at 4 and Exhibit 1.

¹⁰ *See* 47 C.F.R. § 76.905(g). *See also* Petition at 5-6 and Exhibits 2, 3. Exhibit 2 contains the nationwide channel lineups of DirecTV and EchoStar and Exhibit 3 includes the channel line-up for Charter's cable system serving the Communities.

¹¹ Petition at 3-5.

¹² *Id.* at 5.

actually live in zip codes outside of the Communities.¹³ To account for such a possibility, Charter has devised a formula that compares U.S. Census household data for the Communities and the relevant zip codes in order to derive an allocation to apply against the DBS subscriber count.¹⁴ Charter also reduces the estimated DBS subscriber count by 15 percent to reflect the possibility that some households have subscribed to both cable and DBS service and to take into account commercial or test accounts.¹⁵ The Commission believes that Charter's methodology is sound since it seeks to accurately quantify subscribers using the best available DBS subscriber data.

6. Charter asserts that it is the largest MVPD in the seven Communities because Charter's subscribership exceeds the aggregate DBS subscribership for those franchise areas.¹⁶ Based upon the aggregate DBS subscriber penetration levels as reflected in Attachment A, calculated using 2000 Census household data,¹⁷ we find that Charter has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in these seven Communities. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable system serving these seven Communities is subject to effective competition.

B. The Low Penetration Test

7. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if fewer than 30 percent of the households in its franchise area subscribe to its system's cable service.¹⁸ Based upon Charter's subscriber penetration levels in the Towns of Au Sable, Chesterfield, Dannemora, and Saranac, calculated using 2000 Census household data,¹⁹ we find that Charter has demonstrated that its cable system serving these four Communities is subject to effective competition under the low penetration test.²⁰

¹³ *Id.* at 5-7.

¹⁴ *Id.* at 6-7 and Exhibits 4-6.

¹⁵ *Id.* at 6. According to documentation previously provided to the Commission, SkyTRENDS' zip code subscriber numbers are inflated by roughly ten percent "due to dual receivers, and limited commercial and test accounts." See *Charter Communications*, DA 02-1919 at n.13 (MB rel. Aug. 6, 2002). Since then, SkyTRENDS has reportedly revised its inflation estimate from ten to fifteen percent. Petition at n.17.

¹⁶ Petition at 5 and Exhibit 4.

¹⁷ See *id.* at Exhibit 6.

¹⁸ See 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

¹⁹ See *id.* at Exhibit 6.

²⁰ Petition at 7-8 and Exhibits 4, 6. Charter has the following subscriber penetration levels: Au Sable = 15.10 % (178 Charter subscribers ÷ 1,180 Au Sable 2000 Census Households = .1508); Chesterfield = 14.0 % (133 Charter subscribers ÷ 948 Chesterfield 2000 Census Households = .140); Town of Dannemora = 2.2 % (19 Charter subscribers ÷ 850 Town of Dannemora 2000 Census Households = .022); and Saranac = 23.5 % (357 Charter subscribers ÷ 1,519 Saranac 2000 Census Households = .235).

III. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed by Falcon First, Inc. d/b/a Charter Communications **IS GRANTED**.

9. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service in the City of Plattsburgh; the Towns of Au Sable, Beekmantown, Chesterfield, Dannemora, Peru, Plattsburgh, Saranac and Schuyler Falls; and the Villages of Dannemora and Keeseville, New York **ARE REVOKED**.

10. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.²¹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

²¹ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR-5963-E

**COMMUNITIES SERVED BY
FALCON FIRST, INC.
D/B/A CHARTER COMMUNICATIONS
SUBJECT TO THE COMPETING PROVIDER TEST**

Communities	CUIDS	CPR*	2000 Census Households⁺	Estimated DBS[‡] Subscribers⁺	Charter Subscribers⁺
City of Plattsburgh	NY0123	18.6	7,600	1,411	5,485
Beekmantown	NY1521	21.0	2,004	421	904
Peru	NY0041	31.2	2,309	720	1,077
Town of Plattsburgh	NY0325	18.6	4,367	811	3,146
Schuyler Falls	NY0324	21.8	1,866	407	1,021
Village of Dannemora	NY0759	22.8	469	107	298
Keeseville	NY0042	32.2	706	228	607

*CPR = Percent of competitive DBS penetration rate.

⁺See Petition at Exhibits 4-6.

[‡]DBS subscriber estimate includes 15% reduction.